United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

No. 76-1168

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,
APPELLEE,

v.

GENE L. SIMMS ET AL.,
DEFENDANTS, APPELLANTS.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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BRIEF FOR THE DEFENDANT, APPELLANT GENE L. SIMMS

PRELIMINARY STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of New York (Hon. Milton J. Pollock presiding) entered on March 23, 1976 (R.A. 2). The defendant had been found guilty after trial by jury of nine counts in an indictment that charged him and others with a conspiracy in violation of Title 18, U.S.C. 371 to make application for a Small Business Administration loan based upon false vouchers and various substantive charges related thereto (R.A. 3-10).

On Counts 1, 3 through 9 the defendant was sentenced to serve two years on each count,

the sentences to be served concurrently and pursuant to Title 18, U.S.C. 4208A(2). On count 2 the defendant was sentenced to serve three years probation from and after his release from jail on the sentences imposed on counts 1, 3 through 9 (R.A. 72).

STATUTES INVOLVED

18 U.S.C. 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting.

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature, or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof -- shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. 2 Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. 1341. Frauds and swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereof, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

15 U.S.C. 645 Offenses and penalties - False statements; overvaluation of securities.

(a) Whoever makes any statement knowing it to be false, or whoever willfully overvalues any security, for the purpose of obtaining for himself or for any applicant any loan, or extension thereof by renewal, deferment of action, or otherwise, or the acceptance, release, or substitution of security therefor, or for the purpose of influencing in any way the action of the Administration, or for the purpose of obtaining money, property, or anything of value, under this chapter, shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years, or both.

STATEMENT OF FACTS

In mid-June, 1972 Hurricane Agnes caused widespread damage in the central portion of the Commonwealth of Pennsylvania. Among the enterprises damaged by hurricane-caused floods was the Grant Plaza Shopping Center in Huntingdon, Pennsylvania that was in a near-completed construction stage at the time of the flood.

The shopping center was being constructed by Stagg Holding Corporation of White Plains, New York through its subsidiary corporation, Stagg of Huntingdon, Inc. (R.A. 20-25).

The principal officer and sole stockholder of Stagg Holding Corporation and its subsidiaries was A. Michael Stagg (R.A. 21). a co-defendant in the instant case. The defendant, Gene L. Simms, headed up the administrative end of the corporation, and his principal function was to take care of financing the construction conducted by the firm (R.A. 22). The co-defendant, Robert Geffen, was an independent certified accountant who was employed by the Stagg enterprises (R.A. 27). As a result of the flood damage and in order to aid and expedite economic recovery, emergency financial aid measures were put into effect. The Commonwealth of Pennsylvania,

operating through the Bellefonte Area Industrial Development Authority (R.A. 12) made short-term disaster recovery loans to flood-damaged business enterprises who were awaiting Federal Small Business Administration loans (R.A. 11).

In September of 1972 Stagg Holding Corporation made an application to Bellefonte for a disaster loan in the amount of $702,000 accompanied by supporting invoices as documentation for the loan (R.A. 14-16). In mid-October, 1972 a loan was approved in the amount of $664,000 (R.A. 16).

One Albert Bisland was Secretary-Treasurer of the Stagg Holding Corporation (R.A. 19). Bisland had been told by the defendant Simms to work together with co-defendant Geffen in preparing the application for a loan (R.A. 26, 27). Bisland was also told by Simms and co-defendant Stagg that they had formed a company called "Harrisburg Excavating and Equipment Co." for the purpose of consolidating all of the equipment of the Stagg corporations in one corporation. Bisland was to be made President of the newly-formed Harrisburg Excavating and one Marie Peduto,

who at the time was employed by Stagg as a bookkeeper, was to become the Secretary-Treasurer of Harrisburg Excavating (R.A. 29, 30).

). At some time in August or September of 1972 Simms informed Stagg that one Frank DeAngelis (construction supervisor at the shopping center) had not provided the necessary invoices to support the loan application (R.A. 31). Geffen suggested that invoices unrelated to the loan application be altered and submitted in support of the loan application for the flood damage (R.A. 31, 32). The co-defendant Stagg told Bisland to ". . . get it done . . ." Simms was in the office at the time but made no comment (R.A. 32, 33). Utilizing a Xerox machine, Bisland, Geffen and DeAngelis falsified the invoices that were used to support the loan application (R.A. 34). Later in the evening of the day the false invoices had been prepared, Simms returned to the office, and inquired as to whether everything was ready to go to Pennsylvania, and was told that everything was set to go, and they were leaving the following morning (R.A. 35).

The monies received from the State of Pennsylvania were initially deposited in an escrow account entitled "Stagg of Huntingdon, Inc." in the Peoples National Bank in State College, Pennsylvania (R.A. 38). Co-defendant Geffen instructed Marie Peduto in the manner by which she would cut checks to transfer monies from the escrow account to Stagg of Huntingdon, Inc. Peduto was told by the defendant Simms to do what Geffen told her to do (R.A. 39, 40, 41). Checks that were made payable to individuals for work allegedly done pursuant to the loan application were cashed either by Bisland or Peduto at the instruction of Stagg and Simms. Checks that were drawn to corporations for work allegedly done were deposited into an account belonging to Harrisburg Excavating and Equipment Co., Inc. (R.A. 42).

The defendant Simms instructed the construction supervisor at the shopping center site to have materials purchased from Interstate Building Materials shipped to Mr. Simms' home that was being constructed in Connecticut and to charge the cost of those materials to the Huntingdon, Pennsylvania job (R.A. 17, 36).

Additionally, Simms told a Mr. Glauber, the President of Interstate Building Materials, that he was building a house in Connecticut, and that materials ordered from Interstate should be billed to the Huntingdon, Pennsylvania job, and delivery of materials was made to the site of the defendant's home in Darien, Connecticut (R.A. 36, 37).

The defendant Simms testified that he became involved with the co-defendant Stagg in his business enterprises and was to receive a percentage of the profits (R.A. 62). He was told by Stagg to stay away from the loan application for the flood damage to the Huntingdon site (R.A. 63,64). The defendant testified that the materials delivered to his home were pursuant to an agreement between himself and Stagg that enabled the defendant to obtain building materials for his home (R.A. 65-66), and that the charging of the materials off to the Huntingdon job was of no profit to the defendant (R.A. 67). Mr. Simms testified that it was the function of the construction department to collect the documents and invoices in support of an application for a loan, and that he had nothing to do with

the preparation of the documents in the instant case (R.A. 68-70).

Simms denied knowing that the vouchers were false (R.A. 71).

ARGUMENT

I. THE TRIAL COURT ERRED IN PERMITTING THE WITNESS GERALD GARNER TO TESTIFY THAT THERE HAD BEEN A "CONGRESSIONAL INQUIRY" CONCERNING THE APPLICATION FOR LOAN RELIEF AT A POINT IN TIME PRIOR TO THE APPRAISAL OF THE FILE BY MR. GARNER'S STAFF (R.A. 49).

THE TESTIMONY IMPROPERLY PERMITTED THE JURY TO DRAW AN INFERENCE ADVERSE TO THE DEFENDANT SIMM'S CLAIM THAT HE HAD NO KNOWLEDGE OF ANY WRONGDOING IN CONNECTION WITH THE LOAN APPLICATION.

At the time Hurricane Agnes caused the damage to the Grant Plaza Shopping Center, Gerald Garner was the Assistant Branch Manager of the Harrisburg Pennsylvania Disaster Office. In the course of his duties it came to his attention that an application for emergency loan relief had been submitted on behalf of Stagg of Huntington, Inc. (R.A. 44). During the course of cross-examination by counsel for the defendant Simms, the witness testified that his reliance on the extent of damage caused to a particular claimant was based upon his knowledge that his chief appraiser had of the State loan verification process (R.A. 47). In the course of pursuing what exactly it was that Mr. Garner relied on, the defendant referred to the fact that Mr. Garner had dealt with "thousands" of similar loan applications (R.A. 46). In context, the reference to thousands of applications had nothing to do with an attack on the witness's

ability to recall the transaction in the instant case but was obviously an effort solely to call to the attention of the witness that the procedures were no different than in any other application for a loan (R.A. 46, 47).

The Government on redirect examination grasped at the fact that defense counsel had "alluded" to ". . . the thousands of applications . . ." the witness had received and deftly used the reference as a predicate for inquiring whether ". . . there was anything about this application or about this corporation that caused this application of this corporation to stand out in your mind?" (R.A. 48, 49). On objection the Court instructed government counsel to "reframe" the question, prompting a much more concise and compact straw man in the form of ". . . was there something about this application that caused you to pay particular attention to it?" (R.A. 49). The stage having been set, the witness proceeded to front and center and responded with, "There were several things, to start with from the very beginning, before the file was even appraised by our staff, we had a congressional inquiry. Now this might not mean much to most of you but in my business."

The issue herein can more clearly be framed by the recital of two general propositions, neither of which require much by way of citation: first, that redirect examination ordinarily should be limited to the scope of cross-examination and, second, that the trial court has broad discretion in determining the scope of the redirect examination. Although recognizing the liberal trend in admitting evidence pursuant to Rule 43(a) Federal Rules of Civil Procedure, 28 U.S.C., the Third Circuit found no reluctance, however, in reversing a judgment where redirect examination was not limited to ". . . correcting errors in the admission of testimony on cross examination" and the purpose of redirect examination ". . . was not to discredit or explain the cross-examination . . . but to bring out new matter in the form of other opinions and conclusions . . ." Gordon v. Robinson, 210 F.2d 192, 195 (CA 3, Pa., 1954)

The nature of the instant issue is such to minimize the likelihood of finding authority to foursquare on a factual basis. But guidelines have been set and perhaps most succinctly by this Court in United States v. Giglio, 232 F.2d 587 (CA N.Y., 1956). In cross-examination

of a government witness who apparently was friendly to appellants, defense counsel was prompted to elicit testimony that the defendant was held in high regard in his community. The government retaliated by suggesting that the witness's opinion might be altered by knowledge of an arrest of the defendant in Detroit. Although the District Court judgment was affirmed, this Court suggested a different result if:

(1) Defense counsel had not opened the door to this line of questioning.

(2) The prosecutor's question was apparently in good faith.

(3) The jury was instructed to disregard the question,

at page 596.

In the instant case, none of the foregoing criteria has been met. Defense counsel most certainly had not opened the door, although the objected-to question was falsely premissed on that basis. If we are not to attribute bad faith to the prosecutor, the best we can do, in this record, is to conclude that he (and the trial court) seriously misread the context of cross-examination. The alacrity with which the

witness responded to the prosecutor's question might well lead to the inference that he had been primed for the answer. Far from the jury being instructed to disregard the question and answer, the trial court pointedly emphasized the prejudice by promptly twice repeating the forbidden answer.

The prejudice created by the fact of a "Congressional inquiry" takes its dimension from time and place. Twenty years past or at some future time its gravamen could well be considered slight or non-existent. In an era, however, when the shadow of Congressional inquiry can demonstrably result in the unprecedented resignation of a President, the prejudice is grave.

II. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT SIMMS' MOTION FOR MISTRIAL BASED UPON THE CROSS-EXAMINATION OF THE DEFENDANT'S CHARACTER WITNESS, HOWARD J. WEISS.

IN A SERIES OF IMPROPER QUESTIONS PUT TO THE WITNESS, WEISS, THE GOVERNMENT SUGGESTED THAT THE DEFENDANT SIMMS HAD IMPROPERLY CARRIED HIS SISTER ON THE PAYROLL OF THE STAGG CORPORATION AND HAD PERSONALLY APPROPRIATED THE MONIES THAT OSTENSIBLY WERE PAID FOR HER SERVICES. (R.A.[illegible])

The defendant presented an affirmative defense based solely on his own testimony. He asserted his innocence, lack of guilty

knowledge and insisted that he knew nothing of the preparation of the false vouchers that were used as the basis for obtaining the loan proceeds (R.A. 71)

Among the character witnesses offered to shpport his credibility was Attorney Marvin Weiss who t stified of the defendant's excellent reputation for truth, veracity and honesty (R.A. 51). The cross-examination of Mr. Weiss was completely unconcerned with matters relating to the witness's familiarity with the defendant's reputation for truth and veracity. Rather, the government mounted an attack calculated to evidence, in the absence of evidence, that the defendant had improperly skimmed funds from the Stagg corporations through the artifice of putting his sister on the payroll for non-existent work and depositing the paychecks in his own personal account (R.A. 52, 53, 54). Not only did the government fail to support its accusation by evidence in its direct or rebuttal case, but, perhaps more importantly, failed to question the defendant about the alleged matter during extensive and detailed cross-examination of him during his tenure on the witness stand.

While Rule 608(b) of the Federal Rules of Evidence allows of inquiry into specific instances of conduct of an accused in the cross-examination of the accused's character witnesses, the courts have consistently held that such inquiry is limited to the purpose of impeaching the witness himself. Manix v. United States, 140 F.2d 250 (4 Cir., 1944); United States v. Curry, 512 F.2d 1299. The trial judge must ". . . be alert to prevent questions conveying to the jury by innuendo prejudicial matter in which the defendant himself is the real target . . .; the target of the impeachment of a reputation witness is the credibility of the witness, not the prior conduct of the defendant. Shimon v. United States, 352 F.2d 449, 453, 454 (D.C. 1965)

The capacity for extreme prejudice inherent in the cross-examination of character witnesses was acknowledged by the Supreme Court in Michelson v. United States, 335 U.S. 469 (1948). Recognizing the general principle that permits inquiry of character witnesses concerning specific instances of conduct, the Court nonetheless cautioned against allowing counsel to ask ". . . a groundless question to waft an unwarranted

innuendo into the jury box." Id. at 481. The adoption of safety measures to prevent the prejudice has long been urged in the form of in camera examinations to ascertain the true target of the cross-examination. Malatkofski v. United States, 179 F.2d 905 (1 Cir. 1960); Gross v. United States, 394 F.2d 216 (8 Cir. 1968)

In Michelson, supra, it was only the care taken by the trial justice that saved the day for the government. "Wide discretion is accompanied by heavy responsibility on trial courts to protect the practice from any misuse. The trial judge was scrupulous to show care in the case before us. He took pain to ascertain, hot of presence of the jury, that the target of the question was an actual event . . ." At page 480

There was no such care taken by the trial judge in the instant case. Although the trial judge sustained several defense objections to the questions put by the government in this regard, not only was there an absence of the Court insuring that the questions had some foundation, but there was rather an adoption by the Court of the line of inquiry when the

Court chimed in with ". . . did you at any time hear that his sister was employed at the Stagg organization?" (R.A. 53).

In United States v. Giddins, 273 F.2d 843 (1960), the Court of Appeals for the Second Circuit addressed this problem, at p. 845:

> "The practice has been cogently criticized, however, on the ground of the jury's inability to limit its consideration of such evidence to the issue of reputation. This problem is aggravated where, as here, the answer is negative, and thus the inquiry is without probative significance unless others testify to the existence of such rumor or unless the witness' demeanor suggests that his denial is fabricated. But the assumption that a jury, even though instructed as to the immateriality of the exchange, will properly ignore it is doubtless based on unreality."

In the instant case the government was hard pressed to show that the defendant had profited as a result of the false and forged invoices used to support the illegal obtaining of loan proceeds. The defendant, in his testimony, had given an explanation which if believed by the jury would satisfactorily have accounted for the fact that materials billed to the job in Huntingdon, Pennsylvania were delivered to his home in Darien, Connecticut.

The lack of attention to the cross-examination of the defendant's character witness permitted the defendant to be labeled with the stigma of exploiting his sister for the purpose of obtaining funds received from the loan application. It is the kind of onus that at its best is hard pressed to remove. At its worst, as in the instant case, its prejudice should warrant a new trial.

III. THE TRIAL COURT ERRED IN PERMITTING THE GOVERNMENT TO CHARACTERIZE DEFENSE OBJECTIONS AS ". . . FUNNY LITTLE STUNTS . . ." THAT WERE DESIGNED TO PREVENT THE GOVERNMENT FROM " . . . TRYING TO BRING OUT THE TRUTH THAT MR. BISLAND WAS CONVICTED IN THIS CASE . . ." (R.A. 56).

During the course of the direct examination of the witness Bisland by government counsel, a defense objection was sustained to an inquiry concerning the conviction of the witness (in another trial) for the same case against the defendant (Transcript p. 131). During cross-examination of the witness Bisland a co-defendant was permitted to elicit that in fact the witness had been so convicted, prompting a colloquy between counsel and the Court that resulted in the Court rethinking its position and apologizing to the jury for

sustaining the defense objection to the same testimony as the previous day (Transcript pp. 157, 158).

> "While considerable latitude is allowed counsel in argument before the jury in criticizing opposing counsel, nevertheless counsel must keep within the evidence and may not employ language not justified by the record, or resort to uncalled for personal abuse, and it is highly reprehensible for counsel in argument to use, without supporting evidence, language implying that facts have been suppressed by opposing counsel . . ."
> Missouri K.-T.-R. Co. of Texas v. Ridgway, 191 F.2d 363, 369, 370

In United States v. White, 486 F.2d 204 (CA 2, 1973) this Court was reluctant ". . . to formulate per se rules or declare that certain words would automatically trigger mistrials or reversals of convictions" Id. at 207. But there was a recognition, in White, of "the exceedingly fine line which distinguishes permissible advocacy from improper excess . . . to be drawn from the concrete terrain of specific cases . . ." Id. at 207.

It is not the fact of Bisland's conviction that has resulted in prejudice. It is instead the Court's permitting the prosecution to impugn the integrity of counsel and to improperly

saddle the defendant with what the jury was told to construe as an effort by the defense to suppress the truth.

What was it that the defense had done to warrant such scathing attack? Is not the objection to one side or the other impeaching its own witness well within the propriety of advocacy? Is there any more basis to suggest that such an objection is a funny little stunt designed to suppress the truth, than to charge the trial judge, for his original ruling in sustaining the objection,with joining in the complained of gymnastics?

Certainly the trial judge was well within his discretion in forbidding the impeachment of Bisland during direct examination. To make a full circle, however, to the point of sanctioning rather than rebuking the intemperance of the government's unwarranted accusation is prejudice of the gravest kind..

After the second objection, following the accusation that defense counsel were seeking to suppress the truth, the Court's instruction did little to correct the prejudice. The Court merely restated the chronology of the matter at issue and then, missing the point of the objections we submit, stated that "the only significant fact is what is the fact" (R.A. 56).

> "But the situation was one which called for stern rebuke and repressive measures and, perhaps, if these were not successful, for the granting of a mistrial. It is impossible to say that the evil influence upon the jury of these acts of misconduct was remobed by such mild judicial action as was taken." Berger v. United States, 295 U.S. 78, 85, 55 S. Ct. 629, 632, 633 (1935)
>
> "In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence. If the case . . . had been strong, or, as some courts have said, the evidence of his guilt 'overwhelming', a different conclusion might be reached." Berger, supra at p. 89

IV. THE TRIAL COURT ERRED IN PERMITTING THE GOVERNMENT TO ARGUE THAT THE CREDIBILITY OF MARIE PEDUTO PROFFERED AS A WITNESS BY THE GOVERNMENT WAS ENHANCED AS THE RESULT OF THE FAILURE OF DEFENSE COUNSEL TO CROSS-EXAMINE THE WITNESS (R.A. 57).

ADDITIONALLY, THE TRIAL COURT ERRED IN PERMITTING THE GOVERNMENT IN SUMMATION TO ARGUE THAT NOT ONLY DID ALL THREE LAWYERS "WHO APE PROFESSIONALS" FAIL TO CROSS-EXAMINE THE WITNESS FRANK DE ANGELIS, BUT THAT ALL HAD BEEN FURNISHED WITH 3500 MATERIAL (R.A. 59).

Due process of law in a criminal case includes the presumption of innocence and places the burden on the prosecution to prove the guilt of the accused beyond a reasonable doubt by the

evidence which it offers and the inferences which may reasonably be drawn therefrom. This burden of proof is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime. Davis v. United States (1895) 160 U.S. 469, 16 S. Ct. 353. By his plea of not guilty the defendant puts the prosecution to its burden of establishing every fact necessary to constitute guilt. It is the defendant's choice to either produce evidence on his part to meet the case made out by the government or elect to rely upon his legal presumption of innocence. Ezzard v. United States, 7 F.2d 808 (CA 8, 1925).

To permit the government to argue the failure of the defense to cross-examine witnesses as evidence of the truthfulness of the testimony given renders meaningless the presumption of innocence and is a less than benign manner of diverting the burden from that of the government's obligation to prove guilt beyond a reasonable doubt to that of the defendant having to establish through cross-examination his innocence.

In the instant case the defendant took the witness stand and challenged the government's

case in every material particular. The testimony of both Peduto and DeAngelis could well have been reconciled by the jury to the explanations offered by Simms during the course of his testimony (R.A. 65, 66, 67, 70). In making reference to the fact that not only did counsel fail to cross-examine DeAngelis, but that failure was coupled with counsel having had available prior statements, was a bold-faced reference to matters not in the record. The inference was clear. Believe the witness because obviously his testimony was consistent with statements made prior to the trial. If there was any confusion as to drawing this unwarranted inference, the Court did its best to make it clear. In overruling a defense objection to the government's argument that they turn over prior statements of witnesses to the defendants for use in cross-examination, the Court instructed that ". . . the jury is entitled to know that the defendant's prior statements may be turned over to the defendants in advance of the trial, which they were here. The Government took heart at the Court's instruction and again made reference to the fact that all counsel, during cross-examination ". . . had that 3500 information in front of them of Frank DeAngelis"

(R.A. 59). A defense objection was made with the Court's admonition that defense counsel "should allow Mr. Mukasey to complete his argument. He is reflecting within reasonable scope his version of the evidence and events at the trial before the jury . ..." (R.A. 60).

The fact of the defendant's receiving 3500 material prior to trial is not evidence at the trial, but is instead a fact outside the record. Obviously, standing out of context, the possession by defense counsel of witness statements prior to trial is empty of prejudice. It was the hammering away by both government counsel and trial judge that the jury could relate the possession of those materials to the failure to cross-examine that added the forbidden spice to the government's argument.

There was no opportunity to rebut and the trial judge, cast in the role of an arbitrator, performed instead as an advocate.

CONCLUSION

For the foregoing reasons the judgment against this defendant-appellant should be vacated and the case remanded to the District Court with instructions to enter judgments

of acquittal or, if the relief is not granted, to hold a new trial.

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